UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

LISA A. CHOQUETTE,	:	
Plaintiff	:	
	:	
v.	:	Civil Action No.
	:	3:99 CV 562 (CFD)
ROSS J. SANFILIPPO, D.M.D., ET AL.,	:	
Defendants.	:	

RULING ON MOTION FOR SUMMARY JUDGMENT

The plaintiff, Lisa Choquette, filed this action against the defendant, Ross Sanfilippo, D.M.D., et al.,[1] on February 3, 1998 in the United States District Court for the District of Rhode Island. On March 22, 1999, that court transferred the action to the United States District Court for the District of Connecticut based on lack of personal jurisdiction over the defendants in Rhode Island. Subject matter jurisdiction here is based on diversity of jurisdiction under 28 U.S.C. § 1332.[2]

The plaintiff claims that the defendant Sanfilippo breached the standard of care in his treatment of her jaw problems, causing her pain and suffering and permanent injuries. Although the complaint sets forth three counts, it appears to allege state common law causes of action for negligence and lack of informed consent.

The defendant Sanfilippo has moved for summary judgment on the basis that the plaintiff's action is time-barred because it was not brought within two years from the date the injury was

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[1] The other defendants are "John Doe" and "Richard Roe", who are described in the complaint as "presently unknown and unascertained medical care providers who provided care to the plaintiff," but no other allegations are directed to them or describe their involvement in this case. The plaintiff has also named Dr. Sanfilippo's medical corporation as a defendant, but there are no factual allegations directed toward it.

[2] The parties do not dispute that Connecticut substantive law applies.

"first sustained or discovered," as required by Conn. Gen. Stat. § 52-584. The motion for summary judgment [Document #32] is GRANTED for the reasons that follow.

I. Background[3]

The plaintiff, Lisa Choquette, a Rhode Island resident, was referred by her orthodontist to Ross Sanfilippo, D.M.D. ("Dr, Sanfilippo"), for correction of an overbite problem known as mandibular hypoplasia in December 1995. Dr. Sanfilippo has his medical offices in New London. Dr. Sanfilippo saw the plaintiff on January 19, 1995 and recommended a surgical procedure called bilateral mandibular sagittal split osteotomy, which essentially involves extending the lower jaw through the surgical installation of plates on each side of it. On February 7, 1995, Dr. Sanfilippo performed the surgery on the plaintiff at Lawrence & Memorial Hospital in New London, Connecticut.

The parties dispute the events in 1995 and early 1996 following the plaintiff's surgery. The plaintiff has presented evidence that there were many problems and complications caused by Dr. Sanfilippo's medical negligence, which the defendant contests. In any event, the plaintiff's last treatment with Dr. Sanfilippo was on February 9, 1996. At this visit, the plaintiff claims that Dr. Sanfilippo told her that her surgery was unsuccessful, her teeth were misaligned, and permanent nerve damage on the left side of her jaw had resulted from an infection which was not treated properly.

On February 3, 1998, the plaintiff filed this action in the clerk's office for the United States District Court for the District of Rhode Island. On March 23, 1998, the complaint was

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[3]The following facts are taken from the parties' Local Rule 9(c) statements, summary judgment briefs, and other evidence submitted by the parties. They are undisputed unless otherwise indicated.

served on Dr. Sanfilippo by means of waiver of service of summons pursuant to Fed. R. Civ. P. 4(d). On May 22, 1998, pursuant to Fed. R. Civ. P. 12(b)(2), Dr. Sanfilippo moved to dismiss the plaintiff's complaint on the ground that the District Court lacked personal jurisdiction over him. On March 8, 1999, pursuant to 28 U.S.C. § 1631, the plaintiff moved to transfer the case to the United States District Court for the District of Connecticut. On March 22, 1999, the plaintiff's motion to transfer was granted.[4] On September 27, 2000, Dr. Sanfilippo filed a motion for summary judgment here.

II. Standard

In the context of a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). A court must grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." Miner v. City of Glens Falls, 999 F.2d 655, 661 (2d Cir. 1993) (internal quotation marks and citation omitted). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Aldrich v. Randolph Cent. Sch. Dist., 963 F.2d 520, 523 (2d Cir. 1992) (internal quotation marks omitted) (quoting Anderson, 477 U.S. at 248), cert. denied, 506 U.S.

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[4] The defendants's motion to dismiss was referred by the Rhode Island U.S. District Judge to a U.S. Magistrate Judge, who recommended dismissal. However, although the District Court "accepted and adopted" that recommendation, it apparently transferred the case to the District of Connecticut and did not dismiss it. As discussed infra, the Court did not specify the statute that was the basis for the transfer. However, it did state in the order of transfer that there was no personal jurisdiction over Dr. Sanfilippo in Rhode Island. See Choquette v. Sanfilippo, C.A. No. 98-54L (D.R.I. March 22, 1999) (order accepting report and recommendation of Magistrate Judge and granting the plaintiff's motion to transfer).

965 (1992). After discovery, if the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof," then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

"The nonmovant must do more than present evidence that is merely colorable, conclusory, or speculative and must present 'concrete evidence from which a reasonable juror could return a verdict in his favor.' " Alteri v. General Motors Corp., 919 F. Supp. 92, 94-95 (N.D.N.Y. 1996) (quoting Anderson, 477 U.S. at 256). A party may not create its own "genuine" issue of fact simply by presenting contradictory or unsupported statements. See § & Exch. Comm'n v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978). When a motion for summary judgment is supported by documentary evidence and sworn affidavits, the nonmoving party must present "significant probative evidence to create a genuine issue of material fact." Soto v. Meachum, Civ. No. B-90-270 (WWE), 1991 WL 218481, at *6 (D. Conn. Aug. 28, 1991).

In ruling on a motion for summary judgment, the Court resolves "all ambiguities and draw[s] all inferences in favor of the nonmoving party in order to determine how a reasonable jury would decide." Aldrich, 963 F.2d at 523. Thus, "[o]nly when reasonable minds could not differ as to the import of the evidence is summary judgment proper." Bryant v. Maffucci, 923 F.2d 979, 982 (2d Cir. 1991), cert. denied, 502 U.S. 849 (1991); see also Suburban Propane v. Proctor Gas, Inc., 953 F.2d 780, 788 (2d Cir. 1992).

III. Discussion

As indicated, defendant Dr. Sanfilippo has filed a motion for summary judgment on the ground that the plaintiff's cause of action is time-barred under the applicable statute of limitations. The Connecticut statute provides:

No action to recover damages for injury to the person, or to the real or personal

> property, caused by negligence, or by reckless or wanton misconduct, or by malpractice of a physician, surgeon, dentist, podiatrist, chiropractor, hospital or sanatorium, shall be brought but within two years from the date when the injury is first sustained or discovered or in the exercise of reasonable care should have been discovered, and except that no such action may be brought more than three years from the date of the act or omission complained of, except that a counterclaim may be interposed in any such action any time before the pleadings in such action are finally closed.

Conn. Gen. Stat. § 52-584. Dr. Sanfilippo claims that there are no genuine issues of material fact that the date the injury was first sustained or discovered was beyond two years from when this action was brought by the plaintiff. The plaintiff opposes summary judgment, arguing that there are genuine issues of material fact as to when the plaintiff knew, or should have known, of her injuries. The plaintiff also argues that the two-year limitations period and the three-year repose portion are tolled by the "continuing course of conduct" doctrine. Finally, the plaintiff asserts that the filing of the action in the Rhode Island District Court "brought" this action for the purposes of § 52-584.

While the parties dispute when the plaintiff first realized her injuries were actionable after her surgery of February, 1995, and whether the "continuing course of conduct" doctrine tolls the commencement of the two-year statute of limitations or the three-year repose portion of the statute of limitations, the plaintiff does not dispute that she discovered her injuries and the essential elements of her causes of action no later than her final visit with Dr. Sanfilippo on February 9, 1996 when he allegedly told her that her teeth were misaligned and that she had permanent nerve damage. As a result, this action must have been brought no later than February 9, 1998.

The parties disagree, however, as to when the plaintiff's action "commenced" for purposes of determining if it was brought within the statutory time period of two years. The plaintiff

argues that her action commenced, according to Rhode Island state law and Fed. R. Civ. P. 3, on the date she filed this action with the Clerk in the District Court of Rhode Island on February 3, 1998.[5] The defendant contends, however, that the plaintiff's action commenced, according to the Connecticut state law service rule, when he was served with the complaint on March 23, 1998. Thus, the issue is whether the service rules of Rhode Island, Connecticut, or the Federal Rules of Civil Procedure apply.

In determining whether the law concerning commencement of actions of the transferee or transferor state governs, we begin with the authority under which the District Court of Rhode Island transferred the case. See Stephens v. Norwalk Hospital, 2001 WL 987790 at *3, No. 3:00CV998(JBA) (D. Conn. 2001); Levy v. Pyramid Co. of Ithaca, 687 F. Supp. 48, 51 (N.D.N.Y. 1988). The plaintiff moved to transfer pursuant to 28 U.S.C. § 1631, although the Rhode Island District Court did not state in its order the authority for the transfer.[6] In addition to § 1631, it is also possible the Court transferred this case pursuant to 28 U.S.C. § 1406(a), which applies to those actions brought in an impermissible forum. Section 1406(a) provides:

> The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

28 U.S.C. § 1406(a). Section 1631 provides:

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[5] Rhode Island state law, like Fed. R. Civ. P.3, provides that an action is "brought" when it is filed with the clerk, not when it is served on the defendant. R.I. Gen. Laws § 9-1-12 ("An action is commenced for purposes of the statute of limitations when the complaint is either filed with the court, deposited in the mail addressed to the clerk, or delivered to an officer for service.").

[6] This Court notes that the legislative history of section 1631 indicates that it was only intended to apply to cases in which the transferor court lacked *subject matter jurisdiction*, not personal jurisdiction. S. Rep. No. 97-275, 97th Cong., 2d Sess. 11, *reprinted in* 1982 U.S.C.C.A.N. 11, 21; see also Levy, 687 F. Supp. at 51.

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal including a petition for review of administrative action, is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed, or noticed, and the action or appeal shall proceed as it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court form which it is transferred.

28 U.S.C. § 1631.[7]

Whether § 1631 or § 1406(a) is invoked to transfer for lack of personal jurisdiction, the transferee court must apply its law under the circumstances here. Transfers under § 1631 or § 1406(a) implicate different concerns than a "convenience" transfer of venue pursuant to § 1404(a). The United States Supreme Court has held that, under § 1404(a), the transferee court must apply the state law of the transferor court. See Van Dusen v. Barrack, 376 U.S. 612 (1964). If the state law of the forum in which the action was originally commenced is applied following a § 1631 or § 1406(a) transfer, however, the plaintiff would benefit from having brought the action in an impermissible forum. As the Sixth Circuit in Martin v. Stokes recognized, "[p]laintiffs would thereby be encouraged to file their actions in the federal district court where the state law was most advantageous, regardless of whether that district court was the proper forum. Such forum-shopping was what the Supreme Court sought to eliminate by its decision in Van Dusen." 623 F.2d 469 (6th Cir. 1980); see also Stephens, 2001 WL 987790 at *4. Accordingly, as stated by the Second Circuit in Schaeffer v. Village of Ossining, following a transfer for lack of personal jurisdiction, "the transferee court should apply whatever law it would have applied had the action

[7] Although this case was transferred upon motion of the plaintiff, it was not transferred for convenience of the parties and thus, was not transferred pursuant to 28 U.S.C. § 1404(a) which provides for transfer "[f]or the convenience of parties and witnesses." See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504 (1947) (stating that "the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue").

been properly commenced there." 58 F.3d 48 (2d Cir. 1995) (internal quotations omitted); accord SongByrd, Inc. v. Estate of Grossman, 206 F.3d 172, 180 (2d Cir. 2000), cert. denied, 531 U.S. 824 (2000) ("[T]he law of the transferor jurisdiction applies . . . only if the transferor court has personal jurisdiction."); Chaiken v. VV Pub. Corp., 119 F.3d 1018, 1030 (2d. Cir. 1997) (same). Thus, "[w]here a plaintiff moves to transfer a case based on diversity of citizenship from one federal trial court to another so as to cure a defect of personal jurisdiction over the defendant, the state law of the transferee forum governs the action for the purposes of the statute of limitations." Levy v. Pyramid Co. of Ithaca, 871 F.2d 9, 10 (2d Cir. 1989); see also Stephens, 2001 WL 987790, at *4.

The United States Supreme Court has also held that the transferee state service rules, rather than the Federal Rules, govern under these circumstances as well. See Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980). In Walker, the Court stated that, "in the absence of a federal rule directly on point, state service requirements which are an integral part of the state statute of limitations should control in an action based on state law which is filed in federal court under diversity jurisdiction." Id. The Court further articulated that Rule 3 does not "purport[] to displace state tolling rules for purposes of state statutes of limitations, id. at 750-51, and the Second Circuit in Converse v. General Motors Corp. found that the relationship between the purposes served by the Connecticut statute of limitations and its actual service requirement "suggests the integrality of the service requirement." 893 F.2d 513, 516 (2d Cir. 1990); see also Morse v. Elmira Country Club, 752 F.2d 35, 38 (2d Cir. 1984). Thus, the Connecticut state law service rules govern this action.

It is well established that Connecticut follows the "actual service rule" under which an action is commenced upon actual service on the defendant rather than upon filing with the Clerk.

See e.g., Tolbert v. Connecticut General Life Insurance Co., 2001 WL 821187, No. 16397 (Conn. 2001); McGaffin v. Roberts, 479 A.2d 176 (Conn. 1984); Consolidated Motor Lines , Inc., v. M & M Transp. Co., 20 A.2d 621 (Conn. 1941). Therefore, the plaintiff commenced this action on March 23, 1998, when the plaintiff served the defendant with the complaint. As a result, this action was brought more than two years after February 9, 1996, the latest date on which she could claim she discovered the injury and her causes of action.[8] Accordingly, plaintiff's action is time-barred and Dr. Sanfilippo's motion for summary judgment must be granted.[9]

IV. Conclusion

The defendant Dr. Sanfilippo's motion for summary judgment [Document #32] is GRANTED for the preceding reasons. The clerk is directed to close this case.

SO ORDERED this 28th day of September 2001, at Hartford, Connecticut.

_____/s/_____
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE

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[8] Moreover, even if the plaintiff had given the complaint to a state marshal and it was served within fifteen days of such delivery (giving the plaintiff the fifteen day safe harbor provided by Conn. Gen. Stat. § 52-593(a)), her complaint is still untimely.

[9] The two year limitations period of Conn. Gen. Stat. § 52-584 applies to all three counts of the complaint, including the second count for "failure of informed consent." See Lambert v. Stovall, 205 Conn. 1, 5-6 (1987). Also, the claims against the defendants Roe, Doe, and the medical corporation are dismissed.